

AMENDED IN ASSEMBLY APRIL 30, 2012

AMENDED IN ASSEMBLY MARCH 29, 2012

CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

ASSEMBLY BILL

No. 2063

Introduced by Assembly Member Alejo

February 23, 2012

An act to add ~~Sections 13293 and~~ *Section 13294* to the Water Code, relating to water quality.

LEGISLATIVE COUNSEL'S DIGEST

AB 2063, as amended, Alejo. Ex parte communications.

Under existing law, the Porter-Cologne Water Quality Control Act, the State Water Resources Control Board and the 9 California regional water quality control boards are the principal state agencies with responsibility for the coordination and control of water quality in the state. The act requires the state board to formulate and adopt state policies for water quality control, and authorizes the state board to hold any hearings and conduct any investigations in any part of the state necessary to carry out the powers vested in the state board, as specified. The act also requires the regional boards to adopt regional water quality control plans in compliance with the state policies. Existing law requires each regional board to conduct certain proceedings, including, but not limited to, holding at least 6 regular meetings each calendar year.

Existing law, the Administrative Procedure Act, provides for the conduct of administrative adjudication proceedings of state agencies. Existing law generally prohibits ex parte communication including communication during a pending proceeding, regarding any issue in the proceeding, to the presiding officer by an employee or representative

of an agency that is a party to the proceeding without notice and opportunity for all parties to participate, except as specified.

~~This bill would provide that the ex parte communications provisions of the Administrative Procedure Act do not apply to state or regional board proceedings regarding water quality. This bill would prohibit a board member, or any interested person, as defined, from engaging in an ex parte communication, as defined, unless the board member fully discloses and makes public the ex parte communication by providing a full report of the communication to the board on the record of the proceeding at the first hearing that occurs after ex parte communication occurs. prohibit a state board member, a regional board member, or any interested person, from engaging in a communication that would be considered ex parte under the Administrative Procedure Act. The bill would provide that a communication is not ex parte if the communication is between a state or regional board staff member acting in his or her official capacity and any of the following: a state board member, regional board member, or any interested person. The bill would also provide that a communication is not ex parte if the communication is limited entirely to procedure or practice, as specified. The bill would provide that an otherwise prohibited ex parte communication is permissible if the state or regional board member fully discloses the communication, and the communication is in regard to waste discharge requirements, water quality certifications, or conditional waivers of waste discharge requirements, as specified. The bill would also provide that an otherwise prohibited ex parte communication is permissible if a regional board member fully discloses the communication, and the communication is in regard to a municipal separate storm sewer permit, as defined.~~

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 ~~SECTION 1. Section 13293 is added to the Water Code, to~~
- 2 ~~read:~~
- 3 ~~13293. (a) For the purposes of Section 13294, the following~~
- 4 ~~terms shall have the following meanings:~~
- 5 ~~(1) "A matter within a board's jurisdiction" means a~~
- 6 ~~quasi-judicial matter requiring board action, pursuant to this~~
- 7 ~~division.~~

1 ~~(2) “Board” means the State Water Resources Control Board~~
2 ~~or a regional water quality control board.~~

3 ~~(3) “Ex parte communication” is an oral or written~~
4 ~~communication between a member of a board and an interested~~
5 ~~person, about a matter within the board’s jurisdiction, which does~~
6 ~~not occur in a public hearing, workshop, or other official~~
7 ~~proceeding, or on the official record of the proceeding on the~~
8 ~~matter. The following communications are not ex parte~~
9 ~~communications:~~

10 ~~(A) A communication between a staff member acting in his or~~
11 ~~her official capacity and a board member or an interested person.~~

12 ~~(B) A communication limited entirely to procedural issues,~~
13 ~~including, but not limited to, the hearing schedule, location, format,~~
14 ~~or filing date.~~

15 ~~(C) A communication which takes place on the record during~~
16 ~~an official proceeding of a state, regional, or local agency that~~
17 ~~involves a member of a board who also serves as an official of that~~
18 ~~agency.~~

19 ~~(D) A communication between a member of a board, with regard~~
20 ~~to an action of another state agency or of a regional or local agency~~
21 ~~of which the member is an official, and any other official or~~
22 ~~employee of that agency, including any person who is acting as~~
23 ~~an attorney for the agency.~~

24 ~~(E) A communication between a nonvoting board member and~~
25 ~~a staff member of a state agency where both the board member~~
26 ~~and the staff member are acting in an official capacity.~~

27 ~~(F) A communication to a nonvoting board member relating to~~
28 ~~an action pending before a board, where the nonvoting board~~
29 ~~member does not participate in that action, either through written~~
30 ~~or verbal communication, on or off the record, with other members~~
31 ~~of the board.~~

32 ~~(4) “Interested person” means:~~

33 ~~(A) A participant in the proceeding regarding a matter before~~
34 ~~a board, or an agent, employee, or a person receiving consideration~~
35 ~~for representing that participant.~~

36 ~~(B) A person with a financial interest, as described in Article 1~~
37 ~~(commencing with Section 87100) of Chapter 7 of Title 9 of the~~
38 ~~Government Code, in a matter before a board, or an agent or~~
39 ~~employee of the person with a financial interest, or a person~~

1 receiving consideration for representing the person with a financial
2 interest.

3 (C) A representative acting on behalf of a civic, environmental,
4 neighborhood, business, labor, trade, or similar organization who
5 intends to influence the decision of a board member on a matter
6 before the board.

7 ~~SEC. 2.~~

8 *SECTION 1.* Section 13294 is added to the Water Code, to
9 read:

10 13294. (a) A board member, or any interested person, shall
11 not engage in an ex parte communication ~~unless the board member~~
12 *that would be subject to the ex parte communication provisions of*
13 *the Administrative Procedure Act (Article 7 (commencing with*
14 *Section 11430.10) of Chapter 4.5 of Part 1 of Division 3 of Title*
15 *2 of the Government Code), except as provided by this section.*
16 *The following communications are not ex parte communications:*

17 (1) *A communication between a regional or state board staff*
18 *member acting in his or her official capacity and any of the*
19 *following: a state board member, a regional board member, or*
20 *any interested person.*

21 (2) *A communication limited entirely to a procedure or practice,*
22 *that is not in controversy, including a request for a continuance.*

23 (b) *An ex parte communication that would otherwise be*
24 *prohibited shall be allowed if paragraphs (1) and (2) apply:*

25 (1) *The subject and content of the ex parte communication is*
26 *initiated by an interested party and is directed to either of the*
27 *following:*

28 (A) *A state board member or a regional board member*
29 *regarding the adoption, modification, or rescission of one or more*
30 *of the following: waste discharge requirements pursuant to Section*
31 *13263 or 13377, the conditions of water quality certification*
32 *pursuant to Section 13160, or conditional waiver of waste*
33 *discharge requirements pursuant to Section 13269, where, in any*
34 *case, the state board or regional board action does not identify*
35 *specific persons as dischargers, but instead allows persons to*
36 *enroll or file an authorization to discharge under the action.*

37 (B) *A regional board member regarding a municipal separate*
38 *storm sewer permit under Section 402(p)(3) of the federal Clean*
39 *Water Act (33 U.S.C. Sec. 1344 et seq.).*

1 (2) *The state or regional board member fully discloses and*
2 *makes public the ex parte communication by providing a full report*
3 *of the communication to the board on the record of the proceeding*
4 *at the first hearing that occurs after ex parte communication occurs.*

5 ~~(b)~~

6 (c) (1) The state board shall adopt, and provide to the regional
7 board for adoption, standard disclosure forms for reporting ex parte
8 communications which shall include, but not be limited to, all of
9 the following information:

10 (A) The date, time, and location of the communication.

11 (B) The identity of the person or persons initiating, and the
12 person or persons receiving, the communication.

13 (C) A complete description of the content of the communication,
14 ~~including the complete text of any written material that was a part~~
15 ~~of the communication. including:~~

16 (i) *If the communication is written, the writing and any written*
17 *response to the communication.*

18 (ii) *If the communication is oral, a memorandum stating the*
19 *substance of the communication, any response made, and the*
20 *identity of each person from whom the board member received the*
21 *communication.*

22 (2) ~~A~~ *The state or regional board shall place in the public record*
23 *any report of an ex parte communication involving a member of*
24 *that board.*

25 ~~(e) Communications shall not be prohibited ex parte~~
26 ~~communications when fully disclosed and placed in a board's~~
27 ~~official record.~~

28 ~~(d) Nothing in this section prohibits any person or any interested~~
29 ~~person from testifying at a board hearing, workshop, or other~~
30 ~~official proceeding, or from submitting written comments for the~~
31 ~~record on a matter before a board. Written comments shall be~~
32 ~~submitted by mail or delivered to a board office, or may be~~
33 ~~delivered to the board at the time and place of a scheduled hearing.~~

34 (d) *The presiding officer shall notify the parties to the*
35 *proceeding and all other parties subscribed to the notification list*
36 *kept by the state or regional board that a communication described*
37 *in this section has been made a part of the record.*

38 (e) *If a party requests an opportunity to address the*
39 *communication within 10 days after the receipt of notice of the*
40 *communication:*

1 (1) *The party shall be allowed to comment on the*
2 *communication.*

3 (2) *The state or regional board has discretion to allow the party*
4 *to present evidence concerning the subject of the communication,*
5 *including discretion to reopen the hearing that has been concluded.*

6 ~~(e)~~

7 (f) Notwithstanding Section 11425.10 of the Government Code,
8 the ex parte communications provisions of the Administrative
9 Procedure Act (Article 7 (commencing with Section 11430.10) of
10 Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government
11 Code) do not apply to ~~proceedings of a board authorized under~~
12 ~~this division~~ *a communication that meets the requirements of this*
13 *section.*